Filed 2/25/09 P. v. Clark CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. RAYMOND DONALD CLARK, Jr., Defendant and Appellant.	B205013 c/w B210016 (Los Angeles County Super. Ct. No. BA325792)

APPEALS from a judgment and an order of the Superior Court of Los Angeles County, Luis A. Lavin and William N. Sterling, Judges. Affirmed.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lawrence M. Daniels and Lauren E. Dana, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

In case number B205013, defendant Raymond Donald Clark, Jr. appeals from a judgment of conviction entered after a jury found him guilty of petty theft with a prior (Pen. Code, § 666). The trial court found true the allegation defendant suffered a prior conviction of a serious or violent felony (*id*., §§ 667, subds. (b)-(i), 1170.12) and sentenced to the upper term of three years, doubled to six years in state prison. The trial court exercised its discretion to strike the enhancements for prior convictions for which defendant served prison terms (*id*., §§ 667.5, subd. (b), 1385).

Defendant contends his conviction must be reversed because he was forced to appear in jail attire and due to instructional error. We disagree and affirm.

In case number B210016, defendant appeals from a subsequent order denying his petition for writ of error *coram nobis*. Again, we affirm.

FACTS

A. *Prosecution*

Between 8:00 and 9:00 p.m. on the evening of July 16, 2007, Lindsey Woody (Woody), a student at the University of Southern California (USC), parked her bicycle next to the Troy Hall dormitory. She locked it with a U-lock through the bicycle's rear wheel and frame; the lock prevented the bicycle from being ridden. The bicycle had a USC registration sticker on it.

At about 10:00 p.m., Marques Montgomery, a public safety officer for USC, received a radio call about a suspicious person by Troy Hall. Officer Montgomery went to Troy Hall, where he saw defendant, matching the description of the suspicious person, rolling a bicycle on its front tire while holding up the rear tire. The rear tire was locked with a U-lock.

Officer Montgomery asked defendant if that was his bicycle. Defendant replied, "No, it's not my bike." When Officer Montgomery asked whose bicycle it was,

defendant answered, "I just needed the bike to get to the homeless shelter." Officer Montgomery detained defendant then relayed the USC registration number to his dispatcher. The dispatcher contacted Woody, who identified the bicycle as hers and stated that she had not given defendant permission to use her bicycle.

Officer Montgomery contacted the police, who placed defendant under arrest. Defendant's backpack was searched; inside were pliers, wire cutters and a screwdriver. A bicycle belonging to defendant was located nearby. It had a flat tire, and there was another tire by the bicycle.[1]

B. ***Defense***

Woody had lived on the USC campus since May 2006. In that time, she had never seen a non-student pushing a basket and cycling on campus. She knew that a lot of students ride bicycles on campus. She had heard of bicycles being stolen from campus, but she had never heard of anyone finding an abandoned bicycle there. Although she locked her bicycle, she did not lock it to a bicycle rack.

Defendant[2] was 54 years old. He used drugs and had an extensive criminal record.

On July 16, 2007, he was on his bicycle, collecting recyclables. When his bicycle got a flat tire, he went to the store to get a patch for it. He also got something "hard" to drink. He telephoned his former girlfriend for help, and she said he could use one of her bicycles. He walked to her house, got a bicycle,[3] pliers and other tools to change a tire. He returned to his bicycle, but because of carpal tunnel syndrome, he did not have the strength to change the tire. Because he was intoxicated, no one would help him. He returned to the store and bought some wine.

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1 In addition to the testimony presented, the parties stipulated that defendant previously was convicted of a theft-related offense.

2 Defendant, who also represented himself at trial, testified in his own behalf.

3 On cross-examination, defendant testified that he got a tire from Cynthia.

Defendant was walking around near his bicycle, drinking wine and trying to keep warm. When he saw Officer Montgomery approaching, he put the wine bottle in his backpack. Officer Montgomery asked if he was a student and if he had been drinking. Defendant answered "no" to both questions. When the officer asked if he could look in defendant's backpack, defendant handed it to him. As the officer looked inside, defendant explained that the tools were for his bicycle, which was down the street. Officer Montgomery handcuffed defendant and accused him of attempting to burglarize something.

Defendant did not take Woody's bicycle. He was not pushing it down the street when Officer Montgomery stopped him.

DISCUSSION

A. *Jail Clothes*

Just before the prospective jurors were brought into the courtroom, defendant asked the court, "Is there another department that has some clothes?" The court responded, "I'm not aware of that, Mr. Clark. Since you are obviously not dressed in civilian clothing today, I will tell the jurors they are not to make any inference you are in custody. . . ." Defendant did not raise the matter again, and he wore jail attire, a blue jumpsuit, for the remainder of the trial. The trial court instructed the jury: "The fact that defendant is in custody is not evidence. Do not speculate about the reason. You must completely disregard the circumstance in deciding the issues in this case. Do not consider it for any purpose or discuss it during your deliberations."

Following his conviction, defendant made a motion for a "directed verdict of non-suit." One of the grounds for his motion was: "The court called in the jury with defendant still wearing prison clothing and restraints." The trial court denied the motion.

A defendant's right to a fair trial includes the right to appear in civilian rather than jail clothes. (*People v. Taylor* (1982) 31 Cal.3d 488, 494.) This holding is based on "the rationale that compelling a defendant to go to trial in jail clothing could impair the

fundamental presumption of our system of criminal justice that the defendant is innocent until proved guilty beyond a reasonable doubt." (*Ibid*.) Jail clothing serves as a constant reminder to the jury that defendant is in custody and tends to undercut the presumption of innocence. (*Ibid*.) However, a defendant may waive the right to appear in civilian clothing, either as a deliberate tactical matter or by failure to object in a timely manner to the jail clothes or to bring the matter to the trial court's attention. (*Id*. at pp. 495-496.)

In *People v. Pena* (1992) 7 Cal.App.4th 1294, we addressed the question what constitutes a timely request to appear in civilian clothing. We noted that "[t]he 'timeliness' requirement exists to allow a 'court to remedy the situation before any prejudice accrues.'" (*Id*. at p. 1304.) As a practical matter, a timely request must be "one made before the defendant is seen by the jury in prison clothes. [Citations.] For it is only when the jury members see the defendant stripped of his 'cloak of innocence' that prejudice can flow from his appearance." (*Id*. at p. 1305.)

In *Pena*, we concluded that the "appellant exercised his right to wear civilian clothes in a timely fashion. He requested his civilian clothes just before the jury entered the courtroom for voir dire. Appellant therefore objected to his appearance before the jury could have drawn negative inferences from his prison attire. Furthermore, the record reflects appellant's clothes were in the court building. Thus, the request would likely have caused only a slight delay of trial." (*People v. Pena*, *supra*, 7 Cal.App.4th at p. 1305.) We therefore concluded the trial court erred in denying the appellant's timely request to be tried in civilian clothes. (*Ibid*.)

Here, defendant's request to wear civilian clothes was timely, in that it was made before the jury saw defendant in jail clothes. While defendant did not have his own clothes in the court building, as was the case in *Pena*, the trial court made no attempt to ascertain whether clothes were available elsewhere in the court building that could be provided to defendant with a minimal delay in the proceedings. We conclude the trial court erred in failing to do so and causing defendant to go to trial in jail clothes. (*People v. Pena*, *supra*, 7 Cal.App.4th at p. 1305.)

Because the error is of federal constitutional magnitude, the judgment must be reversed unless the error is harmless beyond a reasonable doubt. (*People v. Pena*, *supra*, 7 Cal.App.4th at p. 1305.) We conclude the error was harmless beyond a reasonable doubt.

Defendant argues that he "provided a plausible and exculpatory reason for his presence and why he had been detained[and h]is testimony was supported by physical evidence—his bicycle *was* nearby. But, knowing that [defendant] was locked up in jail, the jury would readily find him guilty because he is a dangerous man, not necessarily because he was guilty beyond a reasonable doubt."

Defendant's testimony was not as plausible and exculpatory as he would lead us to believe. That his bicycle with a flat tire was nearby, and he was unable to change the tire, provided him with a reason to take Woody's bicycle—to replace his own. Additionally, if Officer Montgomery detained him for drinking on campus, and defendant had the bottle of wine in his possession, he could have had defendant arrested for that. Officer Montgomery would have no reason to go get Woody's bicycle, check its registration and have Woody brought to identify it, just to have defendant arrested for stealing the bicycle.

Moreover, defendant shed his "cloak of innocence" when he testified in his own behalf. He testified that he had an "extensive record." He previously was arrested for burglary, petty theft, drug offenses, trespassing and escape without force. He spent time in county jail and state prison. Defendant's appearance in court in jail clothes was no more likely to convince the jury of his danger to society than his extensive record. (Cf. *People v. Pena*, *supra*, 7 Cal.App.4th at pp. 1307-1308 [appellant's jail attire less likely to have damaged his credibility than his outbursts in the courtroom].)

In light of the strong evidence against defendant and the evidence of his extensive criminal record, we conclude that any effect his jail attire may have had on the jury was harmless beyond a reasonable doubt.[4] (*People v. Pena*, *supra*, 7 Cal.App.4th at p. 1308.)

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[4] We do not address the question whether the trial court's instruction to the jury could be considered sufficient to have obviated any harm.

B. ***Instruction on the Prosecution's Burden of Proof***

The trial court instructed the jury pursuant to CALCRIM No. 220 that "[a] defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt."

Defendant argues that because the People have the burden of proving each element of the crimes charged beyond a reasonable doubt (*People v. Hill* (1998) 17 Cal.4th 800, 831-832), the trial court was required to instruct the jury that it must find *each and every element* of the charged offense or special allegation true beyond a reasonable doubt. Its failure to do so, defendant claims, constituted reversible error. We disagree.

As the People point out, "instructions are not considered in isolation. Whether instructions are correct and adequate is determined by consideration of the entire charge to the jury." (*People v. Holt* (1997) 15 Cal.4th 619, 677.) When the entire charge to the jury in the instant case is considered, it is clear that the trial court instructed the jury that the People had the burden of proving each and every element of the charged offense and special allegation beyond a reasonable doubt.

CALCRIM No. 1800 instructed the jury that to prove defendant was guilty of petty theft, the People must prove the enumerated elements of the offense. CALCRIM No. 1850 instructed the jury that to prove the allegation of a prior conviction, the People must prove the enumerated elements of the allegation. CALCRIM No. 220 instructed the jury that if the People are required to prove something, they are required to prove it beyond a reasonable doubt. Read together, these instructions informed the jury that the People had the burden of proving each and every element of the charged offense and special allegation beyond a reasonable doubt.[5] Hence, there was no error in instructing the jury with CALCRIM No. 220 without adding that the People's burden was to prove

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[5] CALCRIM No. 376, discussed in part C, also instructed the jury that the People must prove each fact necessary to a conviction beyond a reasonable doubt.

each and every element of the charged offense and special allegation beyond a reasonable doubt.

C. *Instruction on Possession of Recently Stolen Property*

The trial court instructed the jury pursuant to CALCRIM No. 376: "If you conclude that the defendant knew he possessed property and you conclude that the property had in fact been recently stolen, you may not convict the defendant of petty theft with a prior conviction based on those facts alone. However, if you also find that supporting evidence tends to prove his guilt, then you may conclude that the evidence is sufficient to prove he committed petty theft with a prior conviction.

"The supporting evidence need only be slight and need not be enough by itself to prove guilt. You may consider how, where, and when the defendant possessed the property, along with any other relevant circumstances tending to prove his guilt of petty theft with a prior conviction.

"Remember that you may not convict the defendant of any crime unless you are convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt."

Defendant contends the reference in the foregoing instruction to "slight" supporting evidence impermissibly reduced the People's burden of proof beyond a reasonable doubt. In support of his contention, defendant cites *United States v. Gray* (5th Cir. 1980) 626 F.2d 494 and other federal cases.

Similar language in connection with CALJIC No. 2.15 has been upheld by the California Supreme Court despite numerous constitutional challenges: *People v. Mendoza* (2000) 24 Cal.4th 130, 176-177; *People v. Smithey* (1999) 20 Cal.4th 936, 975-978; *People v. Holt*, *supra*, 15 Cal.4th at p. 677; *People v. Johnson* (1993) 6 Cal.4th 1, 37-38; *People v. Lang* (1989) 49 Cal.3d 991, 1024. We are bound by these decisions. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 454.) We therefore reject defendant's challenges to CALCRIM No. 376.

D. *Writ of Error Coram Nobis*

The judgment against defendant included a restitution fine of $200 pursuant to Penal Code section 1202.4, subdivision (b). Following his conviction, defendant petitioned the trial court for a writ of error *coram nobis*, seeking to vacate the restitution fine on the ground the probation officer's report indicated that the victim did not sustain a loss, so restitution was not required. The trial court denied the motion on the grounds a *coram nobis* petition is not the proper means to challenge a restitution fine, and the restitution fine imposed was a mandatory fine imposed by statute, not restitution ordered to the victim.

We appointed counsel to represent defendant on appeal. Counsel filed a brief raising no issues as to the above order and requesting that we review the record independently pursuant to *People v. Wende* (1979) 25 Cal.3d 436. On September 26, 2008, we notified defendant that he had 30 days in which to raise any issues he wished us to consider. We received no response.

We have examined the record independently and conclude counsel has performed his duty. There are no issues of arguable merit with respect to the order.

DISPOSITION

The judgment and order are affirmed.

NOT TO BE PUBLISHED

JACKSON, J.

We concur:

PERLUSS, P. J. WOODS, J.